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In The

Supreme Court of the United States

October Term, 1996

ZBIGNIEW M. WOJCIK,

Petitioner,

v.

THE UNIVERSITY OF TEXAS
AT SAN ANTONIO (UTSA),

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ZBIGNIEW M. WOJCIK
13703 Morningbluff Dr.
San Antonio, TX 78216-1683
(210) 496-7287, Fax: (210) 496-6218
Pro se

QUESTIONS PRESENTED

1. Should the decision to grant summary judgement be "based on undisputed facts"?

2. Can obscuring discrimination be used to prove discrimination (*Kunda*)?

3. Does viewing Petitioner in a light not most favorable, as the party opposing the motion for summary judgement, violate the standard of review, (*Hibernia*, *Reid* and *Crane*)? Should circumstantial evidence have been construed (*Davis*, *Hibernia*)? Can *Crane* and *St. Mary's Honor Center* prove discrimination? Is the summary judgement appropriate and the case due if the procedures did not follow the standards?

4. Can *Rhodes* and *St. Mary's Honor Center* prove discrimination?

5. Can the identification of nationality on the negative opinion for job continuation / acceptance violate the Immigration Reform and Control Act (*IRCA*)?

6. Can specifications of nationality in negative opinions for job continuation be allowed (*IRCA*, *Zahorik*)?

7. Should emphasis on negative opinion specifying nationality be allowed, *IRCA*, *Zahorik*? Can actions and decision accepting or following these opinions be allowed?

8. Can opinions making forbidden consideration be forbidden for termination (*IRCA*, *Zahorik*)? Can emphasis on the forbidden consideration be forbidden? Can decisions accepting or following these opinions be sanctioned?

QUESTIONS PRESENTED – Continued

9. Can *Title VII* be violated by criticizing Petitioner, in negative opinion, for collaborating in research with his Polish wife, and for using that opinion?

10. Can negative opinions specifying nationality and not counting national publications violate *Title VII*? Can incorporation of these opinions for termination violate *Title VII*?

11. Can a pattern of systematic misspellings of national surnames in a negative opinion and emphasizing that opinion for job termination violate *Title VII* ?

12. Can a specific pattern of a national surname repeated systematically with the position, for which the candidate is given a negative recommendation, violate *Title VII*?

13. Can the test for discrimination set out by *McDonnell Douglas* indicate or prove discrimination?

14. Is proof of discrimination needed to prevent summary judgement *(Celotex)*? Can consideration of nationality in opinions and actions leading to negative job decisions create a genuine issue *(Zahorik)*?

15. In view of all of the above, is there no actual dispute as to any material fact to decide summary judgement (*US Steel* and *Ayo*)?

PARTIES TO THE PROCEEDINGS

Zbigniew M. Wojcik, Petitioner
13703 Morningbluff Drive
San Antonio, TX 78216
Pro se

Malinda A. Gaul,
Gaul and Dumount
105 S. St. Mary's St, #950
San Antonio, TX 78205
Counsel for Petitioner

The University of Texas at San Antonio (UTSA),
Respondent
Martin J. Thompson, Jr.
Assistant Attorney General
General Litigation Division
P.O. Box 12548
Capitol Station, Austin, TX 78711-2548
Counsel for Respondent

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Zbigniew Wojcik, respectfully prays that a writ of certiorari issue to review the matters and judgement of the U.S. District Court granting the Respondent, UTSA, summary judgement, entered in the above proceedings on August 26, 1996. The opinion of the United States Court of Appeals of the Fifth Circuit was entered in the above proceedings on April 2, 1997. The Petition for Rehearing was denied on May 16, 1997.

THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS

The opinion was not officially reported. It states at the end: " . . . the district court carefully considered the special considerations outlined in Zahorik and concluded, based on undisputed facts, that there was no evidence that unlawful discrimination played a role in UTSA's decision to deny tenure to Wojcik". Full opinion is in Appendix.

GROUNDS FOR JURISDICTION

The Court has jurisdiction to issue a writ of certiorari in this case under *Title VII* of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*

STATEMENT OF THE CASE

The Stage in the Proceedings

On August 26, 1996, the U.S. District Court, for the Western District of Texas, San Antonio Division, granted Defendant's, UTSA, motion for summary judgement. Petitioner appealed the District Court decision. Petitioner also filed a Petition on Rehearing which was denied.

Review of the Judgement Sought

The main question that Petitioner raises is the review standard used by the District Court. This petition presents

material facts under dispute to which the District Court applied the wrong standards.

Reasons for Granting the Writ

The Court of Appeals has upheld the use of an improper standard of viewing the matters in a light not most favorable to Petitioner to reach summary judgement. There exist conflicts between the decisions made by the District Court and several precedents on the same matters. This petition presents a lot of dispute over detailed material facts precluding summary judgement, especially marked by *Hibernia*, *Crane*, *US Steel*, *Celotex*, *Ayo* and *Zahorik*. Circumstantial evidence was not construed by the District Court (against *Davis* and *Hibernia*). Approval of the departures from procedures by the Court of Appeals conflicts with decisions regarding the applicable standard of summary judgement, *Rule 56(c)*.

The opinion of the Fifth Circuit Court of Appeals says that the decision to grant summary judgement was "based on undisputed facts", but the standard is that there should be no actual dispute as to any material fact (*US Steel*, *Ayo*). National origin was considered, which was and is under dispute by the interested parties as a matter of law, (*IRCA*, *Zahorik*, *Title VII*), precluding summary judgement.

The next wrong standard is viewing the "undisputed facts", and not just any material facts. This viewing does not necessarily involve the facts under legal dispute and is thus in a light negative to Petitioner.

Respondent has hidden some material facts disabling investigation by EEOC. For instance, statistical analysis of material facts by the EEOC was precluded by not giving the EEOC the tenure files of other non-Polish candidates. This statistical analysis would show, if documents were provided, that *the correlation between national origin specification and job termination is the strongest. There are tenured employees without journal articles, with no qualifications to teach in subject area or research grants.*

Short Statement of the Facts

This is a suit for discrimination based on national origin, Polish, under section 706(f)(3) of *Title VII* of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(f)(3) and under 28 U.S.C. sections 1331 and 1343 (4).

Dr. Zbigniew M. Wojcik was evaluated early by Respondent in 1991 to be terminated. The College Faculty Review Advisory Committee (CFRAC) recommended tenure and discounted a biased reviewer, Fosdick. During deliberations of the lower level Division Faculty Review Advisory Committee (DFRAC), the professional reviewers, Professors Rosenfeld, Ng, Perkowski " . . . were not given serious consideration . . . ", only Fosdick was fully accepted. Fosdick has used "Polish" in his negative opinion. Fosdick was the friend of Zhang. Zhang was another tenure candidate in the same Division. Petitioner was given the termination letter, appealed in 1993. About the same time Dr. Chou, who dealt with diversity at UTSA, indicated the "discrimination against" Petitioner, and a majority of DFRAC members advised the UTSA President in writing they felt they were misinformed regarding the quality of the research of Petitioner by the computer scientists and that Petitioner did not receive fair treatment during DFRAC deliberations. The DFRAC members requested the withdrawal of their votes for termination, and requested Petitioner be considered fairly. The President assured, that if Petitioner agreed to the next evaluation, then external reviewers would be identified by the Provost and the reviewers who took part in the early evaluation in 1991 would not be identified again. Petitioner agreed, the evaluation took place in 1993, after which Petitioner received the second termination letter. Petitioner filed a discrimination charge with the EEOC. Documents received through the EEOC revealed, that in spite of the President's assurances, the external reviewers were identified by Zhang, and not by the Provost. Fosdick, who participated already in the 1991 review, was identified again, though Respondent knew, that Fosdick was biased. In his second negative review, Fosdick used "Polish" again. Another reviewer identified by Zhang, Bovik,

also used "Polish" in his negative opinion. All other professional opinions were in general strongly in favor of Petitioner.

ARGUMENT

1. The whole case should be reviewed from the beginning again, because the decision to grant the summary judgement was not based on actual dispute as to facts.

One of the key problems is explained at the end of the opinion of the Courts of Appeals, that the decision of the District Court to grant the summary judgement was "based on undisputed facts". However, the facts were disputed. The standard is, that summary judgement could be granted only if there is no actual dispute to any material fact (*US Steel*, *Ayo*), so, summary judgement should not have been affirmed by the Court of Appeals. This petition proves, that indeed, the court did not pay the proper attention to the actual dispute over the facts.

2. Obscuring discrimination proves discrimination (*Kunda*).

Based on *Kunda*, tenure determinations should not be disturbed unless decisions are used as the mechanism to obscure discrimination.

(1) Respondent decided to falsify or hide documents for the EEOC: (a) Seven lines are obscured on the copy of the CFRAC evaluation (of November 22, 1991) received by the EEOC, about discounting Fosdick, the biased reviewer, which disabled the EEOC the investigation of the bias; (b) The Affirmative Action Form for Petitioner specifying nationality was not provided to the EEOC. It reveals the mechanism of discrimination against nationalities Polish and Turkish; (c) To get an EEOC determination against Plaintiff, the tenure of Maynard in computer science in 1988 was hidden, though the EEOC wrote a special letter asking for all Maynard's tenure documents. The hiding was revealed in the depositions of Tavernini and Keating; (d) Tenure file of Zhang in 1991 was not delivered up to now. Zhang was charged with plagiarism

in 1991 by CFRAC. Hiding Maynard's tenure with zero articles in work area and Zhang's plagiarism prevented: (i) collection of statistics proving that national origin was the determinative factor; (ii) the negative meaning assigned to Petitioner's Polish publications; and (iii) revealing more differential treatment of Petitioner in the discrimination pattern because of nationality; (e) Tenure files of Divisional faculty were not provided to the EEOC, disabling search for discrimination patterns. "Differential treatment" of candidates with Polish ethnicity in the Division was testified by Professor Tavernini. Instead, Respondent provided the EEOC a few termination letters from a few divisions leading nowhere. Strong correlations exist between specification of word "Polish" and hostile behavior of Respondent's employees and its key reviewers, and could be revealed using statistics from all the files of tenure candidates if the files were delivered. This statistical analysis would show, that *the correlation between national origin specification and job termination is the strongest, as evidenced throughout this petition. There are tenures without journal articles, without qualifications to teach in subject area or research grants. Even plagiarism did not prevent tenure. Therefore, using objective statistical method: correlation, nationality specification was most influential for termination of Petitioner.* Correlation reveals circumstance evidence, *Davis*, *Hibernia*. Thus, obscuring essential documents prevented uncovering discrimination, *Kunda*.

(2) Make-ups are present: (a) In 1993 Dr. Chou wrote: "Dr. Wojcik was discriminated against" and a few years later she decided to make an update: she wrote that she did not mean the discrimination against national origin. Wene's affidavit clarifies this: Dr. Chou "is fully aware of what constitutes discrimination having sued Dr. Ahmad over alleged discrimination. She is also on a University committee that oversees diversity". She spotted quickly the differential treatment of Petitioner by K. Robbins on DFRAC. Her withdrawal was the decision to obscure the discrimination, *Kunda*, the conclusion not drawn against *Hibernia*. Her changing the meaning of "discriminated against" to deal with diversity at UTSA is interpreted negatively for Plaintiff against *Reid*. The

Court's uncovering of the truth in Chou's statements is against *Crane*; (b) The decision of "disqualifying" Fosdick in 1993 was to obscure the discrimination: Fosdick's second "opinion" was solicited by knowing it would be biased, because it was a part of the trap to discriminate. Then this opinion was consumed (seen) by Respondent; (c) The decision to keep in secret the use of Zhang in 1993 was to obscure all his discriminatory actions. The secret use of Zhang prove the intentional discrimination, *St. Mary's Honor Center*. Provost and President do not mention Zhang in their Affidavits. Obscuring discrimination is sanctioned by the courts.

3. Viewing Petitioner in a light not most favorable (as the party opposing the motion for summary judgement) violates the standard of review imposed by *Hibernia*, *Reid* and *Crane*. Circumstantial evidence was not construed (*Davis*, *Hibernia*). *Crane* and *St. Mary's Honor Center* prove discrimination. Summary judgement should not have been granted and the case is not due for non-movant because the procedures did not follow the standards.

Most Plaintiffs must rely on circumstantial evidence to meet the burden of proof, *Davis*. *Hibernia* needs, that direct circumstantial evidences and all reasonable inferences be construed in favor of Petitioner. By *Reid*, fact questions are considered with deference to the non-movant (here Petitioner).

All places referencing *Hibernia*, *Davis*, *McDonnell Douglas*, *Crane*, *Kunda*, *Rhodes* and *Zahorik* in this Petition did not follow *Hibernia*. E.g., words "Polish" in negative opinions about Polish Petitioner should be seen as carrying the meaning of nationality, *Zahorik*.

District Court did not recognize significant departures from regular procedure in the second review, and Court of Appeals allowed the departures: "There certainly is nothing contained within the reports that would indicate any level of review considered improper or inconsistent criteria". Allowing the departures from the procedures during the second

evaluation is not the most favorable for Plaintiff: the Court cited only the first review reports, but knew about the second review and did not mention the missing up-to-date file with committee documents from the review in 1993 and the use of Zhang as a secret advisor for President's decision instead of obligatory CFRAC and DFRAC, against *Hibernia*. CFRAC's report contains statements indicating improper criteria used by DFRAC, Director, Dean, and President in 1991 by using biased Fosdick, what Court knew: "Fosdick's opinion was discounted by the CFRAC . . . " and "It was President Kirkpatrick's understanding . . . that one of the external reviewers was biased . . . ". Bias of any kind is prohibited by Faculty Handbook. Therefore, court's statement "there certainly is nothing contained within the reports . . . " preventing conclusions from using wrong procedures in favor of Plaintiff is against *Hibernia*. This statement also "uncovers the truth" in material facts regarding correctness of the procedures used, against *Crane*: In assessing the evidence for summary judgement the court must not weigh evidence or determine the truth of the matters, but should only determine whether there is genuine issue for trial.

District Court wrote that Maynard " . . . was critical of Plaintiff's qualifications. Specifically, he stated he believed one talk given by Plaintiff appeared to be something that had been done before". Thus, Court implies that Plaintiff copied from other authors, what is not the consideration most favorable for Plaintiff if no evidence exist. What Maynard said, was: "My opinion was that it seemed like something that would have been done, but I didn't know the area, so I didn't know whether it had been done before or not". The Court's "uncovering the truth" in Maynard's opinion that Plaintiff did plagiarism without any evidence is against *Crane*. *Charging Zhang for plagiarism was hidden and no other accusations of this academic type were found in all tenure files received from Respondent, except Petitioner's. Maynard's accusation is thus the part of the "differential treatment" of Polish candidate.* Accepting Maynard as the reason for Respondent's actions by district court precluded the discovery of the intentional discrimination by Maynard. The Court should consider Maynard's anti-Polish

bias evidenced by his emphasis on Fosdick's anti-Polish opinion through discounting all professional unbiased reviewers in 1991, *Hibernia*. E.g., professor Rosenfeld was discounted who published about 400 papers. If Maynard's opinion is meritorious, Rosenfeld's opinion also is meritorious. Maynard's emphasis on anti-national opinion is an intentional discrimination, *St. Mary's Honor Center. Crane* and *St. Mary's Honor Center* prove the discrimination.

Against *Crane* are court's attempts to determine the truth for summary judgement in the statements: "The external reviews were mixed", "Dr. Fosdick was quite critical to Plaintiff's work" and "Dr. Fosdick's letter, however, makes no discriminatory statements with reference to Plaintiff's national origin". *Zahorik* needs just a consideration of nationality. Fosdick has used the word "Polish" carrying the meaning of nationality, and his decision was negative. The same is of Bovik and Zhang. Court knew about Fosdick's bias, see court's statements: "It was President Kirkpatrick's understanding . . . that one of the external reviewers was biased . . . ", and "Dr. Fosdick's opinion was discounted by the CFRAC . . . ". See also words "Polish" in Fosdick's and Bovik's opinions, *Crane. All tenure files received from Respondent show strong correlation of bias only with the specification of nationality, Davis*. Thus, the courts could not decide that Fosdick's consideration of nationality has not influenced his decisions, *Hibernia*.

The District Court wrote, that Bovik's statement calling Petitioner "Polish emigre" is isolated, therefore was not considered as discriminatory. Under *Zahorik*, it misses the legal point: just "Polish" carries the meaning of nationality, thus nationality was considered. Uncovering the truth, depending on statement's "isolation", is against *Crane*. Bovik's opinion shows, that it is not isolated: in the same paragraph, Bovik wrote: "The three grants he (Petitioner) received from the Polish government are impossible to interpret". Court uncovers the truth in this Bovik's statement by interpreting it as "reservations about the Plaintiff's other grants", against *Crane*, which by *Kunda* obscures the discrimination. Bovik's forbidden statements are not isolated also because of two

biased Fosdick's opinions and the solicitation of all biased opinions by Zhang. *In all tenure file received from Respondent, other than Petitioner's, there are no negative comments regarding grants combined with specification of government of national origin*, so, influence of nationality consideration on Bovik's negative recommendation and further decisions incorporating his recommendation may not be eliminated, *Davis*, *Zahorik*. By *Reid*, question facts are resolvable by a reasonable party in favor of non-movant.

The District Court's statement: " . . . the four tenured members had been tenured for years before Petitioner joined the faculty at UTSA" is not true and attempts to determine the truth for summary judgement, *Crane*. Wagner has received tenure at UTSA after Petitioner joined UTSA, and Maynard has got tenure in 1988, about one year before Petitioner joined UTSA, but not years. Neither K. Robbins nor Dr. S. Robbins have tenures in computer science.

The District Court wrote: "the members of DFRAC also used the word "discriminate" in their letter withdrawing their support for termination, but explained that they meant the Petitioner was treated unfairly rather than he was a victim of national origin discrimination". The letter withdrawing their support wrote six faculty members, five of them, Drs. Travis, Tripathi, Wene, Williams, Willson did not testify yet, so they did not explain. Based on *Kunda*, the courts' decisions to grant summary judgement based on testimonies that have not been done was to obscure the discrimination. The District Court wrote: "He testified the word 'discriminate' as used in the letter meant that Petitioner was unfairly treated . . . ". The word "discriminate" was not used in that letter. Likewise, the statement "In fact, the members of DFRAC also used the word "discriminate" in their letter withdrawing their support for termination . . . ", has no support in Record: the word "discriminate" was not used in that letter. Based on *Kunda*, false material facts used for the summary judgement was to obscure discrimination, thus the discrimination exists. Therefore, by *Reid*, the inference could be made in favor of non-movant, that the question fact, the word "discriminate" was

implied in the faculty letter, and meant "discriminate against" Polish origin.

4. *Rhodes* and *St. Mary's Honor Center* prove discrimination.

Based on *Rhodes*, a prima facie case, together with proof that the reason offered by Defendant for its action is untrue, "will often, perhaps usually, permit a finding of discrimination without additional evidence." Petitioner has the prima facie case (see application of *McDonnell Douglas*). The untrue reasons were as follows:

(i) Dr. Tavernini testified: "There was definitely malice in this case". "Q. You signed letter . . . indicating that you believe that Dr. Wojcik had been discriminated against. Do you recall that? A. Yes". Then, Tavernini told: " . . . the definition of discrimination probably . . . should be rephrased unfairly treated". "Q. So, he was treated unfairly, . . . because . . . he was not reviewed by somebody who could understand his field, his publications were criticized maybe inappropriately? A. (Witness nodding head)". But this reason for unfair treatment at UTSA given by Defendant and put into Tavernini's mouths was not true, because Petitioner was reviewed in 1991 by Professors Rosenfeld, Ng, Perkowski, who could understand Petitioner's field and were very strong academic professionals, only " . . . were not given serious consideration . . . " by DFRAC, Director and other administrators. Discounting these professionals gave full power to Fosdick's anti-Polish review. Accepting the untrue reason by the District Court precluded the discovery of the intentional discrimination, *St. Mary's Honor Center*, by giving full power to Fosdick's anti-Polish review, against *Hibernia* and *Zahorik*. Thus, discrimination of Petitioner because of national origin is proved with *Rhodes* and *St. Mary's Honor Center*. Accepting the untrue reason and the rejection of the evidence of the pattern of "differential treatment" testified by Tavernini is not most favorable for Plaintiff, against *Hibernia* and *Zahorik*.

(ii) The reason offered by Defendant for its actions (tenure denial and termination) is, that Plaintiff was not qualified:

"Defendant contends Plaintiff could not make a prima-facie case because he was not qualified for tenure". The District Court decided: "this is a case which reflects nothing more than considerable disagreement . . . with regard to Plaintiff's qualifications". Thus, court's decision was not "not qualified", but "disagreements with regard to qualifications", thus "not qualified" is not a true reason offered by Defendant for its actions. These unfavorable "disagreements" are resolvable by a reasonable party in favor for Petitioner, because they were influenced by nationality consideration (*Zahorik*). The prima facie case is proved in the section on the test for discrimination set by *McDonnell Douglas*. Thus, discrimination is found with no more evidences, *Rhodes*.

(iii) Defendant also offers as a reason a specific deficiency, a lie: "In research, Wojcik's shortcomings are significant. He published only 3 articles while at UTSA". Petitioner published 15 research articles while at UTSA. Articles (papers) are most important indicator of quality in academia, documenting academic accomplishments. Petitioner's qualifications presented by Defendant were the product of the lie.

5. The identification of nationality in the negative opinions for job continuation/job acceptance violated the *IRCA*.

The *IRCA* says: "An employer who singles out individuals of a particular national origin or individuals who appear to be foreign to provide employment verification may have violated both *IRCA* and *Title VII*". The tenure process is the employment verification process: employee who does not pass it gets the termination letter. *IRCA* was not used by the courts, against *Hibernia*.

(i) Two reviewers, Fosdick and Bovik, specified "Polish" in their three negative opinions for job continuation and tenure. Fosdick was requested to provide his opinion two times, in 1991 and in 1993, both were negative and both used words "Polish". The word "Polish" used in any opinion about Petitioner in 1991 and 1993 for sure identifies Petitioner's nationality. *No tenure files received from Respondent, other than*

Petitioner's, show any negative opinions identifying nationality of candidates, Hibernia, Title VII. Only Petitioner has two opinions given by one reviewer, both identifying nationality and both negative. This strong correlation may not eliminate influence of national origin identification on job termination, *Zahorik*. The Court of Appeals allows singling out nationality for job verification – for the termination.

(ii) District Court "uncovers the truth" in singling out nationality "Turkish" in "Affirmative Action Form" by Respondent, against *Crane*: "This does not appear to be a form to be used for the purpose of discrimination . . . Plaintiff was hired for the position". This justification misses the point, because *strong correlation of singling out national origin in writing with job acceptance decision is evidenced* by three question facts: (i) labeling candidate's nationality by "Turkish" and not hiring him; (ii) not labeling Plaintiff as "Polish" and hiring Plaintiff. Hiring Plaintiff is thus correlated with not making the reference to his national origin, and (iii) then, after hiring, terminating Petitioner after singling out his nationality in writing by Fosdick and Bovik. *Not all Defendant's employees had enough information to apply "differential treatment" to Plaintiff because of nationality at the time of hiring.* For instance, K. Robbins involved in the "differential treatment" did not know anything about Petitioner prior to hiring him, what she remembered after years on her deposition. The "uncovering the truth", *Crane*, and rejection of the evidence of the "differential treatment" of faculty with Polish background precluded the conclusion in favor of Plaintiff, as needed by *Hibernia*. The form specifying nationality used by Respondent was not filled in by a candidate, thus the purpose of using it for discrimination may not be eliminated. Personality of the "Turkish" candidate who was not hired was not considered, because Respondent did not have an opportunity to observe him or her.

6. Specifications of nationality in negative opinions follow *Zahorik*.

Zahorik indicates the discrimination by a circumstance: "Absent evidence . . . that . . . disagreements or doubts are influenced by forbidden consideration such as . . . national origin, universities are free to . . . set their own required levels . . . ". Petitioner's disagreements or doubts are influenced by the meaning of nationality carried by the words "Polish" used during the evaluations by Respondent for job termination. The statement below shows, that District Court did not apply *Zahorik* but provided directly the conclusion: "Dr. Fosdick's letter, however, makes no discriminatory statements with reference to Plaintiff's national origin". It misses the legal point, because the word "Polish" used by Fosdick in writing carries the meaning of Petitioner's nationality, and thus involves the forbidden consideration under *Zahorik*. Uncovering the truth, whether word "Polish" with its context is discriminatory or not, is forbidden for the court without jury under *Crane*. Similarly, Bovik has used words "Polish" in his negative opinion, thus Bovik has involved forbidden consideration of nationality. The influence of short commercial advertising on people's minds is very well known. Presentation of nationality "Polish" in negative opinions has worked on subconscious of the readers who then have made their decisions. Negative subjects usually do not get accepted.

The letter signed by several DFRAC members indicates the disagreements or doubts regarding the evaluation of Petitioner who is Polish. Specifically, Professor Tavernini's doubts or disagreements were influenced by nationality consideration, evidenced in his testimony about *"differential treatment"* of faculty with Polish ethnicity. He testified, that UTSA employees, *K. Robbins, her husband and Wagner were "adamantly opposed" to hire faculty of Polish background.* These employees did unusual effort to get rid of them, thus, *there is an evidence of the efficient pattern of discriminating Polish faculty*. For instance, Dr. Kolaski, candidate of Polish ethnicity, had research papers but was rejected by the differential treatment, and Maynard, non-Polish, was brought for

tenure in computer science in 1988 without having even one research grant or research article in that area. Both had worked at UTSA before. All tenure decisions regarding Maynard, Kay and Steve Robbins and Wagner were considered non-competitive by Respondent: none could qualify, none had even undergraduate computer science or computer engineering education. The " . . . considerable disagreement . . . with regard to Plaintiff's qualifications" stated by the Court evidences the differential treatment of Petitioner, because qualifications were not the real issue with respect to other tenured computer science faculty, they were weak. The DFRAC Chair said: " . . . the extent of the detail devoted to the quality was not consistent with what usually happens . . . ".

The mechanism of discrimination is by singling out nationality in writing and giving that for reading to decision makers. DFRAC members have read the biased Fosdick's opinion considering Petitioner's nationality (through word "Polish") and thus were influenced by it. The level of the discriminatory influence can be seen by comparing DFRAC decision with CFRAC decision. Both committees have used the same tenure file. *DFRAC accepting Fosdick's opinion singling out nationality has decided to terminate Petitioner, and CFRAC discounting biased Fosdick has decided tenure.* CFRAC did not write, that the reason of their rejection was the use of words "Polish", however, the rejection of the entire Fosdick opinion by CFRAC has removed for sure the whole consideration of nationality involved in it, and has changed dramatically the verdict regarding the employment. Polish papers could be counted by Respondent and by its reviewers, because they were counted by CFRAC. Unfortunately, the Dean and other officials have accepted Fosdick's opinion. Negative opinions are strongly correlated with the consideration of nationality: only Fosdick's and Bovik's opinions both singled out nationality, did not count Polish papers and were negative, evidencing ethnic bias pertinent to Academia. *All opinions that did not reject Polish papers or did not accept their rejection were strongly in favor of job for Petitioner. Depositions and all tenure files of other candidates received*

from Respondent show no evidence of not counting their national papers for tenure, Davis, Zahorik.

Later withdrawal of most DFRAC votes for termination is strongly correlated with the consideration of nationality during evaluations: *no tenure files, other than Polish Petitioner's, show any considerations of nationality followed by withdrawal of votes, Davis, Zahorik.* Tavernini and Wene prove that consideration of nationality have influenced DFRAC's doubts and disagreements expressed in the faculty letter.

Singling out nationality in the negative review by Fosdick is strongly correlated with setting up the criteria to absurd by Respondent: Petitioner's journal was seen as trash, and Zhang's journal was presented as outstanding though it was the same journal (see disagreements or doubts of Tavernini and Wene). K. Robbins, the most influential DFRAC member, was the donor of this opinion. *No evidence exist in all tenure files received from Respondent of setting DFRAC tenure criteria to absurd and singling out candidate's nationality other than Polish, Davis, Zahorik.* So, the influence of a strong anti-Polish bias on termination decisions may not be eliminated. Involvement of K. Robbins in the absurd evidences her "differential treatment" pattern.

The next absurd following the singling out of Petitioner's nationality by Fosdick is associated with charging Zhang for plagiarism. Professor Wene wrote: "The College Committee was informed by Dr. Rocky Shi that the other candidate for promotion and tenure from the Division of Mathematics, Computer Science and Statistics had copied several of his results from a journal of the Chinese Military Academy. The Committee decided that this extremely serious charge of scholastic dishonesty should be investigated . . . A letter was sent to Dean . . . I have never received a formal notification of the results . . . ". Professor Wene expressed his disagreements or doubts by presenting two candidates: (i) Zhang charged for plagiarism, and (ii) Petitioner demanded by Division Director to "separate his Polish publications from other publication in his resume". Zhang has received tenure one year later, and Petitioner has received two termination letters.

Wene's comparison of the two candidates evaluated under the same Committees at the same time shows, that the consideration of publications of Polish national origin by Director is correlated with the job termination, and the charge of another candidate for plagiarism is correlated with tenure, Davis, Zahorik. Note, the same academic position was considered in the same Division. Wene's Affidavit does not show any other reasonable factors that might influence the decision to terminate Petitioner. *No evidence exists in all tenure files received from Respondent showing, that a demand to separate publications of any national origin might lead to tenure, Davis, Zahorik.* The evidence of nationality consideration and its influence on decisions is proved, *Zahorik*, but was not drawn by the courts against *Hibernia, Kunda.* Evidence exists that this separation was for the negative consideration, because Maynard has published zero papers in computer science and was brought for tenure in computer science. *Having zero papers in academic job area is correlated with awarding the tenure position but having Polish papers is correlated with two termination letters for the same academic position* in the same Division, *Hibernia.* Thus, strong negative influence of consideration of national origin of papers on decisions may not be eliminated, *Zahorik.*

Also disagreements and doubts of Director Ahmad follow *Zahorik*: "Q. How has Mr. Wojcik been damaged, in your estimation?" " . . . he would have gone through the normal process that other people went through. There would have been a FRAC, there would have been a committee, there would have been outside reviewers reviewing his work . . . " "Q. Okay. Well, the reality is, that there were outside reviewers in Mr. Wojcik's case, isn't that correct? A. I have no idea what they did. I was not consulted. In fact, the provost consulted Zhang, . . . and it was all a secret from me. . . . Zhang was involved all along in the process. As far as that's concerned, I think that the fact they asked the same person who has written very negative letter for him the year before, to ask that person the second year to write another negative letter, certainly doesn't seem like an unbiased process to me". "I would not have asked Fosdick again to write a letter for

him". " . . . If you do a review and one of them writes a very negative letter, the review would be a phony review if you didn't pay attention to that negative letter". The issue is, that the influence of Zhang's ethnic anti-Polish bias on his actions against Petitioner may not be eliminated. Professor Perkowski, the reviewer in 1991, wrote in Appendix to Brief of Appeal to Court of Appeals: "*Advising Andrzej Ehrenfeucht (name of a Pole misspelled) by Zhang as reviewer for Dr. Wojcik in 1993 is an example of Zhang's ethnic bias, since Dr. Fosdick in his first review in 1991 mentioned his Polish colleague . . . who did not hear about Wojcik's work, what influenced Dr. Fosdick's negative opinion*", *Zahorik*. Also two reviewers from Zhang's list, Fosdick and Bovik, considered Petitioner's nationality in their negative opinions. *Zhang's secret list of reviewers that considered nationality is correlated with significant departures from standard evaluation procedures* exploiting this list in 1993, thus the influence of nationality consideration by Zhang on the review process in 1993 may not be eliminated, *Zahorik. No tenure files received from Respondent indicate, that a consideration of nationality in the phase of preparation of the list of reviewers might guarantee a proper review standard or non-discriminatory opinions, Davis, Zahorik. Trapping Petitioner into Zhang's secret list with anti-Polish reviewers in 1993 proves the purposeful discrimination, St. Mary's Honor Center.*

Two other faculty members of non-Polish origin from the same department, Wagner and Zhang, have failed during their early reviews, but their second reviews were regular and their national articles were not rejected. Thus, singling out nationality is strongly correlated not only with absurd criteria, but also with setting out and using special evaluation procedure deviating from standard, incorporating rejection of national Polish publications by reviewers. *The existence of the special evaluation procedures in 1993 to protect the secret use of Zhang prove a purposeful discrimination, St. Mary's Honor Center.* Court's "there certainly is nothing contained within

the reports . . . " prevents uncovering this intentional discrimination, against *Hibernia. No tenure files, other than Petitioner's, show any evidence of a secret agent identifying reviewers who specify nationality, Davis, Hibernia.*

The next Director's disagreement is his letter of December 2, 1992 to the Provost, requesting that decision to terminate Petitioner be reversed. There is more evidence, that Director's decision to terminate Petitioner, and then his disagreements, were correlated with forbidden consideration of national origin (*Zahorik*), because Depositions show that Director remembered spoken comments from computer science faculty considering nationality: "Q. Any comments about his, Dr. Wojcik's, Polish papers; any comments about those? A. I think I did hear that he has a lot of publications, and most of them are in obscure Polish journals". "It was . . . during those first two years". These comments had to make strong impression on the Director since he had remembered them so long.

No evidence exists in all tenure files delivered by Respondent showing continuation with employment after identification of nationality in contexts of negative opinions, Davis, Zahorik.

7. Emphasis on negative opinion specifying nationality have violated *Title VII* and follow *Zahorik*. These emphasis prove application of Respondent's anti-Polish bias. Actions and decisions accepting or following these emphasis should not be allowed.

The Director said: "in . . . computer science . . . I don't have expertise myself". Dr. K. Robbins, who was most qualified among all computer science faculty evaluating Petitioner, said during DFRAC deliberations that she did not understand Petitioner's research work (Dr. Wene's Affidavit). Director wrote his doubts about the tenured computer science faculty evaluating Petitioner: "Their research accomplishments in CS (computer science), as judged by publications in refereed computer science journals, are practically nonexistent. Dr. Wojcik, on the other hand, as evidenced by his two fairly

recent publications in the IEEE Transaction on Software Engineering, has a very respectable publication record". Nobody at UTSA was in Petitioner's strongest areas – Artificial Intelligence and applications of rough sets. So, the basis for Respondent's decision could not be correlated with professional analysis of Petitioner's work by Respondent's employees. In spite of weak professional background of the Respondent's employees in computer science, the genuine issue is, how the professional external reviews were used.

The Director disagreed, that external opinions of all very strong academics who were not biased, Professors Ng, Perkowski and Rosenfeld, "were not given serious consideration" by Respondent (see Ahmad's letter to the Provost of December 2, 1992). *Rejection of all very strong unbiased external experts had the effect of the acceptance of only biased Fosdick's negative opinion with words "Polish", thus the rejection has emphasized anti-Polish bias and proves the intentional anti-Polish action* of DFRAC, *St. Mary's Honor Center, Hibernia. All tenure files of candidates of non-Polish nationality provided by Respondent show: (i) serious consideration of all professional external reviewers; and (ii) no emphasis on a biased review indicating nationality* of a candidate. If Respondent would be interested in professionalism of Fosdick in the subject area, then also would be interested in other professional reviews, especially after rejecting Fosdick for bias by CFRAC. In addition, short descriptions of external reviewers required by Faculty Handbook were missing in Petitioner's tenure file both in 1991 and 1993, and all other tenure files received from Respondent had the descriptions. Thus, consideration of Petitioner's nationality by Fosdick has been made more serious than consideration of professional matter, *Zahorik*. The emphasis on biased Fosdick followed the pattern of "differential treatment" of Polish faculty, because was carried out by K. Robbins' group. All administrators (incl. the Director) have followed DFRAC, by that they also have emphasized anti-Polish bias, *Zahorik*. Respondent admits the consideration of Polish origin through a Polish professor mentioned in Fosdick's opinion who had influenced

Fosdick's negative opinion about Polish Petitioner. The District Court has allowed Fosdick's opinion, thus giving his bias involving nationality more weigh than to other professionals (like Rosenfeld), against *Crane. The President and Provost have emphasized Fosdick's anti-Polish bias by asking Fosdick for his review again* in 1993, *St. Mary's Honor Center, Hibernia.*

The President has got used to consider nationality for academic position in the past (*Zahorik).* When provost position was open at UTSA, Kirkpatrick was pushed by nationalists to accept a Hispanic candidate: "The naming of an Hispanic provost would have been a signal that we had been understood". "This community is telling Dr. Kirkpatrick that we are not a small group", and a group of Hispanic students called for Kirkpatrick's resignation, see article "Dean from university in Ohio rejects UTSA's provost position", V. J. Garcia, San Antonio Express News, May 16, 1992.

8. Acceptance of opinions making forbidden considerations should be forbidden for termination, *Zahorik*. Opinions of people who make emphasis on the forbidden consideration should be forbidden, and decisions accepting or following these opinions should be rejected.

The District Court has set up and used the requirement, that "some significant portion of those involved held a favorable view on the issue". This contradicts *Zahorik,* because those who consider nationality and give negative opinion may be seen the "significant portion". E.g., Maynard's untrue opinion, a part of the discrimination pattern, was allowed by District Court to approve summary judgement, against *Hibernia, Title VII.* Consideration of nationality for termination should be forbidden for court, *Zahorik.*

9. *Title VII* was violated by criticizing Petitioner, in negative opinions, for collaborating in research with his Polish wife, and by using the opinions.

Title VII says: "Equal employment opportunity cannot be denied because of marriage or association with person of a national group origin".

Fosdick wrote in his negative opinion about Petitioner's articles in 1991: "I also find it surprising that none has a joint author, other than B. Wojick". "I see it highly unusual". In his second negative opinion in 1993 Fosdick wrote: " . . . he kept to himself and did not collaborate with others on the faculty (excepting his wife)". Kay and Steven Robbins are non-Polish couple in computer science; Steven Robbins was promoted for his papers co-authored with his wife. Note, Fosdick knew all faculty, including the Robbins couple (see: " . . . backgrounds in computer science are weak" in Fosdick's "Report on Graduate Program in Computer Science, Division of MCSS", 18 April, 1990), therefore it is "surprising" that he did not criticize Steve Robbins for collaboration with his wife. *The employment opportunities of Petitioner were not equal because of collaboration with Polish wife, to opportunities of the non-Polish couple who also collaborated: Petitioner has got two termination letters, Title VII.* The Divisional Committee and administrators knew the couple Robbins. They knew that B. Wojcik is Petitioner's Polish wife, because she worked at UTSA for over one year. They could reject Fosdick, but have chosen not only to accept Fosdick, but to discount all professional reviewers who did not mention Petitioner's Polish wife, what is a deliberate emphasis on ethnic discrimination. This followed the pattern of "differential treatment" of Polish faculty. The District Court did not draw conclusion about the Polish couple, against *Hibernia*.

10. Fosdick's and Bovik's negative opinions considering Petitioner's nationality and not counting Polish publications violated *Title VII*. Use of these opinions for termination violated *Title VII*.

No opinions in all tenure files received from Respondent, other than about Petitioner, specify nationality and do not count national papers (see Bovik's and Fosdick's negative opinions), *Hibernia*. This strong correlation of negative opinions with consideration of nationality indicates violation of *Title VII* saying: "No one can be denied equal employment opportunity because of . . . membership or association with specific ethnic promotion groups".

Fosdick questions Petitioner's contribution to Polish knowledge (heritage). One Polish professor who influenced this decision told Fosdick that he has not heard about Petitioner, and Fosdick's bias has stimulated him to change that to the stronger statement, that "Wojick" had no reputation in Poland, what is not true, as testified by expert Ziarko. This Fosdick's conclusion involving Polish heritage indicates Fosdick's anti-Polish bias. *No tenure files of nationalities other than Polish show any evidence of stimulation towards negative comments considering national origin, Zahorik, Davis.* Even Zhang, who was charged by highest tenure committee, CFRAC, for plagiarism, did not have in his tenure file any note about his reputation in his native country. Maynard and Wagner, without any journal articles in computer science, have no critiques about their reputation in their native country. Only Petitioner has, proving discrimination because of national origin.

Exclusion of Polish publications may not be eliminated as influencing the termination, because: (i) The exclusion has taken place during two evaluations of Petitioner in 1991 and 1993. In 1993 Bovik indicated 17 refereed articles which exclude Polish papers. Bovik indicated, that before coming to USA Petitioner published in "low quality journals", what treats Polish journals as "low quality"; (ii) In 1991 Fosdick indicated he did not read 3 out of 5 Petitioner's English papers sent to him for review, but wrote: " . . . there are some

troubling aspects to it. I cannot speak for the Polish journals in which his papers have appeared". In 1993 he did not indicate to have read any articles sent to him in English, but he wrote "I exclude the Polish publications as I am not familiar with the Polish journals". But *CFRAC was not familiar with Polish journals and counted Polish papers.* Was Fosdick asked to discuss Polish journals? The plural of his statement: "troubling aspects", and his indication of his Polish colleague who has influenced his negative judgement prove, that his lack of familiarity with Polish journals was not the only reason of his exclusion of "Polish publications", and thus do not eliminate his anti-Polish bias.

Fosdick's epithet "long rambling discussion", relating to Petitioner's paper applying Polish rough sets and published in IEEE journal, *is strongly correlated with his identification of Polish nationality. Nobody otherwise has ever challenged the level of the IEEE journal* (see all tenure files and all the external reviewers), the evidence of strong ethnic bias. *The same IEEE journal was evaluated excellent for Zhang by DFRAC two days later.* Petitioner's accomplishments in rough sets, academic specialty brought from Poland, were excluded from the positive consideration in opinions specifying nationality, violating *Title VII. Depositions and all tenure files received from Respondent, other than Petitioner's, do not show any evidence of exclusion or negative treatment of work in any national speciality of any candidate, Zahorik, Davis.* The title of this Petitioner's paper has the wording "rough sets", impossible to overlook by academic professionals.

Bovik's decision was influenced by singling out nationality. Petitioner's paper "Application of Rough Sets for Edge Enhancing Image Filters" was published in Proceedings of International Conference on Image Processing, 1994, pp.525-529, organized by Bovik, whereas Petitioner's papers in image processing, were not acceptable for Bovik in his opinion. Petitioner has been developing his unique approach to image filtering since about 1974 and had publications in this topic elsewhere. *Petitioner's approach has passed Bovik's public criteria set out by IEEE for his conference, but did not*

pass his criteria set out in his "confidential" opinion specifying Petitioner's nationality, Hibernia, Zahorik.

Bovik wrote: "It is difficult to believe that the Army would fund a recent emigre from Poland in 1986". The Riders Digest Great Encyclopedic Dictionary defines "Emigre – an immigrant; especially one who fled to escape the French or Russian revolution". *Epithet "Polish emigre in 1986" is nasty for Poles, because the Solidarity Movement in Poland supported by Polish Pope was not a communist revolution, Title VII.* Identification of Petitioner by anti-Polish epithet is a direct discrimination in academic opinion. *No tenure files, other than Polish Petitioner, show any critiques of any other national government or immigration status of any candidate, Title VII.* These proves Bovik's anti-Polish bias. Bovik's opinion was entirely accepted by Respondent for termination. All co iderations of nationality by words "Polish" were allowed by the courts, against *Zahorik.*

11. A pattern of systematic misspellings of "Wojick" (Petitioner's Polish surname "Wojcik") by Fosdick and emphasizing his opinion for job termination violated *Title VII.*

Title VII says: "no one can be denied equal employment opportunity because of . . . surname associated with national origin group". Fosdick spells correctly Petitioner's surname "Wojcik" only once at the beginning of his negative opinion in 1991, and then always writes "Wojick". *No other tenure files received from Respondent show any pattern of misspelling of national surname*, indicating strong correlation of the misspelling pattern with the negative recommendation, *Davis, Title VII.* This specific misspelling pattern of Polish surname may not be excluded as a part of his opinion for termination. The court did not pay attention to this question fact.

12. A specific pattern of the national surname repeated systematically with the position for which the candidate is given a negative recommendation violated *Title VII.*

No other tenure files received from Respondent show a specific pattern of a national surname repeated with the position for which the candidate is given negative recommendation. The national surname "Wojcik" is strongly correlated with the position "Professor" from which Petitioner is terminated: "Professor Wojcik" is repeated several times in Bovik's "less than positive" opinion for the position "Professor". *Polish surname was not given employment opportunity equal to all non-Polish candidates, as seen in all tenure files provided by Respondent.* Strong correlation of recommendation for termination with presentation of Polish surname in specific non-positive pattern exists, because both Fosdick and Bovik have challenged Polish surname of Petitioner, *Davis, Title VII.* All considerations of national surname were allowed by the courts, against *Zahorik.*

13. The test for discrimination set out by *McDonnell Douglas* proves discrimination.

Significant departures from regular evaluation procedures in 1993 were used as a legal proof of a non-discriminatory treatment. By the local Regents Rules, decisions to not reappoint non-tenured faculty like Petitioner are "subject to review only to determine whether the decision was made for reasons that are unlawful". Under *McDonnell Douglas*, the evidence burdens are sufficient if Plaintiff establishes a prima facie case presuming the discrimination in violation of *Title VII.* Defendant is then required to produce a legitimate, non-discriminatory reason for its action, *McDonnell Douglas, Id.* at 802, 93 S. Ct. at 1824,1825. The second review initiated by President was a pretext for discrimination, *McDonnell Douglas, Id.* at 1825, because:

(1) Petitioner's lawyer indicated "unlawful reasons" and Petitioner indicated "discrimination . . . because of Polish

ethnic background" in his appeal of January 14, 1993, presuming violation of *Title VII*.

(2) Petitioner had and has the *prima-facie case*, because: (i) is of Polish origin; (ii) was qualified for tenure, having strong support of most credible and significant parties evaluating Petitioner. Only incredible opinions and decisions that considered nationality, emphasized or involved this forbidden consideration, were against Petitioner. Petitioner has accomplished in all six criteria for tenure (see CFRAC's recommendation, the highest committee to recommend tenure). Petitioner has strong support of all professional reviewers, professors Rosenfeld ("It would be hard to find a stronger candidate", 1991), Ng ("Your favorable decision . . . is highly recommended", 1991), Perkowski (" . . . Wojcik locates himself on par with tenured professors from top U.S. research universities", 1991), Novak (" . . . a strong case for tenure", 1993), Malek ("I strongly support his candidacy . . . ", 1993), Proskurowski (" . . . grants Dr. Wojcik indefinite tenure",1993); and (iii) was denied tenure in circumstances permitting inference of discrimination.

(3) Respondent then has produced the second evaluation in 1993 as a legitimate, non-discriminatory reason for its action, but has done it with procedures departing strongly from the standard and involving consideration of nationality. Specifically: (i) Negative external opinions given by Bovik and Fosdick solicited by Respondent through Zhang considered Petitioner's nationality. Zhang's list of external experts involved nationality consideration. (ii) President trapped Petitioner into discrimination by assuring in writing, that none reviewer can be identified again. The trap was set up, because Respondent broke its own assurance and identified again Fosdick, who already participated in the first review in 1991 and was discounted by CFRAC because of his bias. Fosdick was also asked for his second opinion. Words "Polish" in Fosdick's negative opinion written in 1991 were visible (*Zahorik*). *The evidence of the trap proves the purposeful forbidden discrimination, St. Mary's Honor Center;* (iii) Deliberate discrimination is evidenced more by setting up the next trap. The President assured, that if Petitioner agree for

the second evaluation, then the Provost would identify external reviewers. Petitioner agreed. But Zhang, in secret, has identified all external biased reviewers. Zhang's bias against Polish origin is indicated by listing among Fosdick and Bovik also a Polish professor working at Colorado University together with Fosdick, mentioned by Fosdick in his opinion. Respondent knew about the discriminatory influence of this Polish professor from Colorado, because this Polish professor, according to Respondent, gave Fosdick the reason for his first negative opinion. The selection of Zhang in 1993 was deliberate to discriminate, because: (a) Zhang provided biased Fosdick in 1991; (b)Fosdick used words "Polish" in his negative opinion in 1991; and (c) Zhang worked in secret. Fosdick could be rejected together with Zhang in 1993 before asking Fosdick for his second opinion. But this did not happen. The discrimination was planned, because making a trap is a planning. Zhang's secret work, making the trap successful, was completely outside of DFRAC and CFRAC committees, and both the Provost and the President knew very well, that only these official committees, the Director and Dean, were eligible to provide advice regarding tenure. Zhang was deliberately given the protection to do all his secret discrimination undisturbed by any committees. "It was President Kirkpatrick's understanding . . . that one of the external reviewers was biased . . . ", and words "Polish" were visible in the first opinion of that reviewer. Zhang was friend of that reviewer. *No tenure files, other than Polish Petitioner's, show the kind or level of departures from the regular procedure in which the President takes a friend of a biased reviewer against a candidate.*

All non-Polish faculty members are protected against discrimination by Faculty Handbook evaluation procedures. Substantial part of these rules was not used in 1993 to evaluate Petitioner, what was correlated with the use of Zhang's list of external reviewers, though official CFRAC and DFRAC "are by definition advisory" for all President's termination or tenure decisions, what President knew. Thus, the President knew he was obligated to consider the recommendations of committees, and thus to ask for their advises for each decision

he makes. The rules also say: (i) "An up-to-date file shall be established in the Division Office", but a complete up-to-date file was not established in 1993. The file from 1991 could not be the up-to-date file in 1993 and some material in it was missing (e.g., regarding Petitioner's service and contacts with external institutions); (ii) "Division Director shall, on behalf of the University, place in the file any and all material". The Division Director testified he was not involved in the evaluation in 1993 at all. He would not place the second Fosdick's opinion in the file; (iii) "Letters of recommendation are to be requested by Division Directors and replies addressed to the Division Director". This did not happen, the replies in 1993 were addressed to the Provost. Thanks to this, biased Fosdick was requested for biased opinion again in 1993 and he has sent his opinion to Provost. (iv) "Division Director shall recommend to the Dean . . . ", "DFRAC shall provide advisory recommendation only on faculty reappointment, tenure or promotion", "Division Director shall give full consideration to the recommendation of the DFRAC", "CFRAC shall provide advisory recommendations only on faculty reappointment, tenure or promotion", "CFRAC shall give full consideration of the Division Director and DFRAC", etc. CFRAC would reject Fosdick in 1993 together with Zhang because of CFRAC's action in 1991, so, the trap to discriminate would fail, therefore CFRAC had to be eliminated. DFRAC would provide more than half votes against termination. In December 2, 1992 the Director requested that the decision to terminate Petitioner be reversed. His "up-to-date" advisory recommendation was thus necessary in 1993, together with DFRAC's, CFRAC's and Dean's. "Up-to-date" file was not prepared in 1993 and there were no advisory recommendations in 1993 based on that file, allowing only secret Zhang's advises. Respondent wrote, that Petitioner agreed for the evaluation in 1993. This is true, but Petitioner did not agree for the departures from the rules: *as the result of the withdrawal of the first termination letter, Petitioner was returned to the tenure-track position and should be treated as any other tenure candidate* when the evaluation started in 1993. Zhang's and Wagner's second evaluations have followed the

Faculty Handbook procedures, thus different treatment in 1993 is correlated with the pattern of anti-Polish "differential treatment", and the additional agreement worked as a trap for subsequent discrimination. The second evaluation was the pretext for discrimination. Faculty Handbook specifies only one evaluation procedure for any tenure-track employee. The traps that have worked out prove the anti-Polish pattern of the "differential treatment" at all levels. The evaluation in 1993 involved nationality consideration through Zhang, Bovik, Fosdick, Provost and President. The evaluation in 1993 with the pattern of "differential treatment" and words "Polish" in negative opinions may not be allowed as the Respondent's required level, *Zahorik*. President should make his determination based on a complete "up-to-date" file prepared in 1993 according to rules.

In spite of: (i) strong recommendations of all professional external reviewers and the highest review committee CFRAC, and (ii) the withdrawal of votes by majority of DFRAC, only a careful discrimination plan involving consideration of national origin could lead to termination of Petitioner. All the departures, involving the positive result of the test for discrimination (*McDonnell Douglas*), were allowed by courts.

14. Proof of discrimination is not needed to prevent summary judgement, *Celotex*. Consideration of nationality in opinions and actions leading to negative job decisions is a genuine issue.

When granting summary judgement, the District Court wrote: "Unless Plaintiff can show, that the decision made by UTSA to deny him tenure was in fact motivated by discrimination, the evaluation of Plaintiff's qualifications must be left to the school administrators", *Kunda*. How to prove discrimination without making the case? The proof is not needed to reject summary judgement under *Celotex*, though is shown in this petition. Not using properly *Zahorik* by court to spot considerations of nationality by words "Polish" is against *Hibernia*.

15. In spite of all the above, there is still an actual dispute as to the material facts, and the summary judgement should not be granted (*US Steel* and *Ayo*).

The party seeking summary judgment bears a "burden of showing that there is no actual dispute as to any material fact in the case." *US Steel*. In determining whether the movant (defendant) has met this burden, the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, must demonstrate there is no issue of material fact as a matter of law, *Ayo*. Thus, only one issue of material fact in dispute precludes the summary judgement, and many are shown.

CONCLUSION

Circumstantial evidence which was not viewed in a light most favorable for Petitioner indicates that tenure was denied because of national origin: specification of national origin in opinions is the most decisive factor for the negative tenure decisions. The lack of publications or research grants did not matter, even plagiarism did not prevent tenure, but the consideration of national origin did. Significant part of this circumstantial evidence was found in the documents not provided for investigation by EEOC, thus intended to be obscured from professional view. Respondent uses against Petitioner only opinions and decisions of people, who considered Petitioner's nationality negatively. The President and Provost discriminated by giving Fosdick the second opportunity to discriminate Petitioner, but not giving DFRAC a second chance to evaluate Petitioner fairly, as majority of DFRAC requested. Intentional discriminiation is proved by collecting the second biased Fosdick opinion as a result of a trap. Petitioner has a prima facie case because of a strong support of all professional opinions.

Zbigniew M. Wojcik
13703 Morningbluff Dr.
San Antonio, TX 78216-1683
(210) 496-7287, Fax: (210) 496-6218
Pro se

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 96-50732
Summary Calendar

ZBIGNIEW M. WOJCIK,

Plaintiff-Appellant,

VERSUS

UNIVERSITY OF TEXAS AT SAN ANTONIO,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(SA-95 CV-93)

(Filed Apr. 2, 1997)

Before WISDOM, JOLLY, and BENAVIDES, Circuit Judges.

Per Curiam:*

Zbigniew M. Wojcik sued his former employer, the University of Texas at San Antonio (UTSA), for employment

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in local Rule 47.5.4.

discrimination under Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000e, et seq. Wojcik, a native of Poland, alleges he was denied tenure because of his national origin. The district court granted summary judgement for the defendant. Wojcik appeals.

As is well known, in Title VII case the plaintiff must first establish a prima facie case of discrimination. To establish a prima facie case in the context of a denial of tenure, the plaintiff must show that: (1) he belongs to a protected group, (2) he was qualified for tenure, and (3) he was denied tenure in circumstances permitting an inference of discrimination.[1] If the plaintiff establishes a prima facie case, then he has raised a presumption of discrimination and the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the challenged action.[2] If the defendant meets this burden by presenting evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action, then the presumption raised by the plaintiff's prima facie case essentially disappears, and the plaintiff is left with the ultimate burden, which has never let him: that of proving that the defendant intentionally discriminated against him.[3]

Other circuits have recognized that tenure decisions in colleges and universities involve considerations that

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[1] *Zahorik v. Cornell University*, 729 F.2d 85, 92 (5th Cir. 1984)

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)

[3] *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747-49 (1993)

set them apart from other kinds of employment decisions.[4] Those factors are: (1) tenure contracts require unusual commitments as to time and collegial relationships, (2) academic tenure decisions are often non-competitive, (3) tenure decisions are usually highly decentralized, (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement.[5]

Tenure decisions are not, however, exempt from judicial scrutiny under Title VII. To prove a prima facie case, a plaintiff may be able to show "departures from procedural regularity", "conventional evidence of bias on the part of individuals involved", or that the plaintiff is found to be qualified for tenure by "some significant portion of the departmental faculty, referents or other scholars in the particular field".[6]

In this case, the district court carefully considered the special considerations outlined in *Zahorik* and concluded, based on undisputed facts, that there was no evidence that unlawful discrimination played a role in UTSA's decision to deny tenure to Wojcik. Based on our de novo review of the record, we find that the summary judgement was appropriate. Accordingly, the district court is AFFIRMED.

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[4] *Zahorik v. Cornell University*, 729 F.2d 85, 92 2nd Cir. (1992); *Kumar v. University of Massachusetts*, 774 F.2d 1, 11 (5th Cir. 1985)

[5] *Zahorik*, 729 F.2d at 92-93.

[6] *Id.* at 93-94